ST. VINCENT

IN THE COURT OF APPEAL

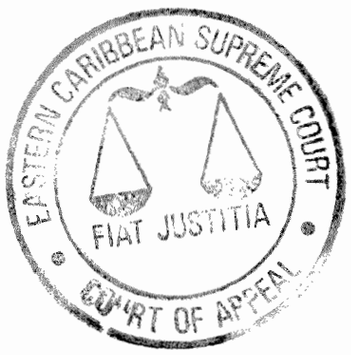
CRIMINAL APPEAL NO. 6 of 1977

BETWEEN:

EDWARDO LYNCH

VS.

THE QUEEN



Before: The Honourable Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Nedd (Acting)

Appearances: C. Dougan for Appellant

O. Jack, D.P.P. for Respondent

1977, Sept. 26, 27 & 30

J U D G M E N T

ST. BERNARD J.A. delivered the Judgment of the Court:

The appellant was charged on an indictment containing six counts, three of which were for the offence of larceny and three for the offence of falsification of accounts. He was convicted on the 16th March, 1977, on all these counts and was sentenced to five years imprisonment at hard labour on each count to run concurrently. He has appealed against conviction on various grounds and against the sentence.

The charge against the appellant on the first two counts related to the withdrawal of one thousand one hundred dollars from the savings account of one Sylvina Richardson kept at the Georgetown Post Office - a sub-department of the

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Government of the State. The appellant was the cashier at the time and the only person responsible for paying customers and making the respective entries in the cash and ledger accounts at the Post Office. The Revenue Officer in charge was one Joel Gilchrist who had taken over duty from one Thelma Child on the 6th July, 1971.

Sylvina Richardson opened the account in 1963 in the name of herself and her daughter Priscilla Richardson. In 1969 the amount of one thousand dollars was withdrawn by Sylvina and she did not return to the Post Office in respect of this savings account until the 8th November, 1971, when she intended to close the account. At the time she opened the account she was given a pass book which she kept and brought with her on the 8th November, 1971. At this time the Revenue Officer was Joel Gilchrist. He told Richardson that she would have to leave the pass book so that interest could be added and in the meantime a cheque for the amount due would be obtained from head office in Kingstown. He observed that the amount in the pass book did not correspond with that in the account and he therefore made entries in the passbook. He observed that the sum of one thousand one hundred dollars was withdrawn on the 21st July, 1971, at a time when the appellant was the cashier at the office and on the same date when he had handed over duty to Thelma Child. He examined the account of Sylvina Richardson and found that there was a note in the appellant's handwriting on the 8th

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April, 1971 to the effect that "Pass-book was reported lost." The matter was reported to the C.I.D. and further investigation revealed that the withdrawal slip, the entries in the cash book, and ledger account were in the handwriting of the appellant. Sylvina Richardson denied that she ever lost or reported to Thelma Child or anyone the loss of her passbook. The appellant stated from the dock that a woman came to Thelma Child in April and he was directed to make the entry about the loss of the pass book. Thelma Child stated on oath that no one reported the loss of any pass book and she gave no such direction to the appellant. The appellant stated that they were no pass books then in Georgetown. Thelma Child stated that the office was never without pass books. The appellant further stated that on the said 8th April, 1971, when he was directed to make the entry against the account of Sylvina Richardson that he looked through the current ledger and there was no name of Richardson and he told this to Thelma Child and she brought out a dormant ledger. Child denied this on oath and stated that the account did not qualify for being placed as a dormant one and she gave appellant no instruction of that kind whatsoever. The appellant said further that late in July, 1971 when Gilchrist was in charge of the office the same woman returned and asked to withdraw one thousand one hundred dollars and was told to return on the Monday when Thelma Child, the person

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to whom she had reported the loss of the pass book would be there. She returned on the Monday, that is the 21st July, 1971, (the day Gilchrist was handing over to Miss Child) and both Gilchrist and Child instructed him to give the withdrawal slip to her so that she could get the money. He did not have the full amount of money in the cashier's drawer and therefore Miss Child brought a sum of money to him to make up the amount. He checked the money and Gilchrist and Miss Child also checked the money and he paid it out to a woman. He also stated that Miss Child told the woman that when the book was found to take it to the office immediately. Part of this transaction was not put in cross-examination to the witness Child but Gilchrist stated that no such events took place on that day and whatever was put to Child was denied.

In respect of the evidence relating to these two counts Counsel submitted that the appellant's defence was that he paid a woman not necessarily Sylvina Richardson and this defence was not adequately put to the jury. In our view the jury heard the evidence for the prosecution and the judge reminded them of these facts in his summing up and it was for them to say on the facts deposed whether they believed the prosecution's story or were left in reasonable doubt on the whole of the evidence having taken into consideration the appellant's account of what transpired. The trial judge told the jury;

/"You.....

> "You are the arbiters of the facts of this case and it is entirely a matter for you to say what evidence you accept and what evidence you reject. You are the ones who should draw inferences from the facts of the case- and they should be reasonable inferences- but if on any given set of facts it is open to you to draw two inferences one favourable and one not favourable to the accused then it will be your duty to draw the one which is favourable to the accused. And, finally, if on any aspect of this case you entertain a reasonable doubt that is to say, a real substantial doubt, then it will be your duty to resolve that doubt in favour of the accused."

We do not find any inadequacy as contended by learned counsel. The question before the jury was a simple question of fact and we do not find the inference drawn was wrong. This submission fails.

Counsel also contended that the evidence in the whole case was circumstantial and that the trial judge was in error when he told the jury that the crown did not rely upon circumstantial evidence. He submitted that the evidence was purely circumstantial and therefore it was the duty of the judge to give a special direction to the jury and the absence of this direction was fatal to the convictions and they should be quashed. He cited the case of Burns v Holgate (1967) 11 W.I.R. 111. In any case we do not agree that, at least, these first two counts rested entirely on circumstantial evidence. It is our view in a trial in which the case for the prosecution, or any essential ingredient thereof, depends as to the commission of the act wholly on circumstantial evidence, no duty rests upon the judge, in addition to giving the usual direction that the prosecution must prove the

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case beyond reasonable doubt, to give a further direction in express terms that this means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the appellant and (b) exclude every possible explanation other than the guilt of the appellant. (Vide Mc Greevy v. Director of Public Prosecutions (1973) 57 C.A.R. 424). The trial judge directed the jury as follows in regard to the burden of proof;

> "In every Criminal trial it is the duty of the Prosecution to prove the guilt of the accused to you and they must prove the guilt of the accused to you in such a way that they make you feel sure not only that the offence has been committed but that the accused is the person who committed that offence with which he is charged."

This ground of appeal must fail.

The evidence in regard to counts three and four related to the savings account of Maude Clouden who was illiterate. This account was opened in 1957, but there was no specimen signature. In 1964 two withdrawals were made by Clouden but they were witnessed by a Justice of the Peace who was not called at the trial. On the 11th August, 1971, there is an entry in the cash book in accused's handwriting showing that $350 was paid to Clouden but the writing on the withdrawal slip was not identified. Clouden had not withdrawn any money and her pass book was not debited with any such withdrawal. At this time there was one Francisca Small in the office who assisted the appellant in his duties and he stated that she would call out particulars from the voucher

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and he entered them in the cash book. Francisca is now in the United States. Although there is grave suspicion that the appellant may be implicated in this transaction we feel it would be unsafe and unsafisfactory to uphold the conviction on these two counts.

In regard to counts five and six the evidence is that on the 19th August, 1971, Ruth Hoyte who had a Savings Account at the post office was debited with the sum of three hundred dollars although she had made no withdrawal and there was no entry in the pass book to support any withdrawal. On the 10th January, 1973 she went to withdraw $300 and Gilchrist found that there was not enough money in her account and there was an entry of a withdrawal from her account on the 19th August, 1971.

After investigation it was revealed that the date, the writing of three hundred dollars and the name Ruth Hoyte on the withdrawal slip was in the writing of the appellant and the rest of the entry was in the handwriting of Francisca Small. The cash book and ledger entries were in appellant's handwriting. The appellant stated that he knew nothing about these transactions. Soon after these transactions the appellant left for the United States to study and returned after a lapse of approximately five years.

It was argued on behalf of the appellant that the evidence was insufficient for a conviction on these counts. The same submission in respect of circumstantial evidence was also made. We have already expressed our view in regard to

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circumstantial evidence. We find the evidence was sufficient for any reasonable jury to have come to the conclusion that the appellant was guilty on both these counts. In the result the appeal is dismissed in so far as counts one, two, five and six are concerned and is allowed in respect of counts three and four. The convictions on these counts are quashed and the sentences set aside.

Counsel argued that the sentence was excessive having regard to the appellant's age and his previous good character. We feel that the appellant was placed in a position of trust. He abused the confidence reposed in him and planned a deliberate system of fraudulent transactions. We feel the sentence is not excessive and the appeal against sentence is dismissed.

(E.L. St. Bernard)
JUSTICE OF APPEAL

(R.A. Nedd)
JUSTICE OF APPEAL (ACTING)

(Sir Maurice Davis)
CHIEF JUSTICE